

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY,

Plaintiff,

v.

D. DAHNE,

Defendant.

CASE NO. C12-5060BHS

ORDER ADOPTING IN PART
AND MODIFYING IN PART
REPORT AND
RECOMMENDATION,
GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

This matter comes before Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 59), Plaintiff Thomas W.S. Richey's ("Richey") objections (Dkt. 62), and Defendant Dennis Dahne's ("Dahne") objections (Dkt. 63). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL AND FACTUAL BACKGROUND

Originally, both parties asserted that the facts were undisputed. Dkt. 46 at 1-2; Dkt. 52 at 1. Now, however, it appears that some material facts are disputed.

1 Richey, an inmate, submitted a prison grievance that identified a prison officer as
2 “an extremely obese Hispanic female guard” Dkt. 47, Declaration of Thomas WS
3 Richey (“Richey Dec.”), Exh. A. An officer, who is not a party to this proceeding,
4 declined to accept the grievance and, instead, returned the grievance to Richey with an
5 instruction to rewrite it appropriately and resubmit it within five days. *Id.* Richey
6 rewrote portions of the grievance, repeated the language quoted above, and resubmitted
7 the grievance. *Id.*, Exh. B. The R&R states that an unidentified officer refused to accept
8 the grievance and, instead, ordered Richey to rewrite the grievance stating that “Hispanic
9 female is adiquit [sic]. Extremely obese is un-necessary [sic] and inappropriate.” Dkt. 59
10 at 4. The record, however, reflects that Dahne ordered Richey to rewrite the grievance.

11 Dahne declares as follows:

12 I directed Offender Richey to comply with the previous rewrite
13 instruction he had gotten because the grievance contained so much
14 irrelevant, inappropriate, and borderline threatening extra language. I told
15 him to: “Rewrite as directed. Hispanic female is adequate [sic]. Extremely
16 obese is un-necessary [sic] and inappropriate.” I did not have room to
17 include every single part of the grievance that was not in accordance with
18 the OGP guidelines, but I believed a reasonable person could understand
19 that making repeated references to a staff member’s weight and talking
20 about guards getting strangled have nothing to do with an actual grievable
21 issue and are inappropriate.

22 Dkt. 52-2 at 3–4. Dahne did not date this rewrite order. Dkt. 70, Exh. 2.

On December 7, 2016, Richey submitted an offender’s kite to Dahne asking if
Dahne, as the grievance coordinator, was going to process his grievance. *Id.*, Exh. 3.
Dahne responded as follows: “No, due to your decision not to rewrite as requested, your
grievance has been administratively withdrawn.” *Id.* The Court was originally under the

1 impression that there was a rule that failure to rewrite a grievance automatically resulted
2 in an administrative withdrawal of the grievance. After further review of the record,
3 however, it does not appear that this is a mandatory rule. Instead, it appears that the
4 grievance coordinator may also grant an extension of the timeframe to rewrite the
5 grievance or automatically appeal an initial grievance to the next level. Dkt. 52-2 at 38–
6 40. Regardless, Richey asserts that Dahne failed to date the document ordering Richey to
7 rewrite his grievance and, therefore, questions of fact exist whether five days passed
8 before Dahne considered the grievance administratively withdrawn. Dkt. 70 at 4 (citing
9 *id.*, Exh. 2).

10 Furthermore, Richey has submitted evidence that Dahne accepted a rewritten
11 grievance dated December 8, 2016 with the same identification number as the original
12 grievance. *Id.*, Exh. 4. On this grievance Dahne wrote that it “will be forwarded to HQ
13 as appeal of coordinators request for rewrite.” *Id.* Richey contends that, if his response
14 was procedurally untimely and withdrawn, the grievance could not have been forwarded
15 as an appeal. Dkt. 70 at 5. This evidence appears to contradict Dahne’s claim that he
16 administratively withdrew Richey’s initial grievance.

17 These facts allegedly implicate two provisions of the Washington Department of
18 Corrections’ (“DOC”) Offender Grievance Program (“OGP”). First, if the inmate’s
19 “complaint contains profane language, except when used as a direct quote,” the grievance
20 form is returned “unprocessed with a notation to rewrite it.” Dkt. 52-2 at 33. Second, the
21 Grievance Program Manager and Dahne declare that if an inmate “does not follow the
22 rewrite instruction within the required timeframe” – within five days of receipt of those

1 instructions – “the matter is considered administratively withdrawn, which is the
2 procedural determination made when OGP deadlines are missed without reason for the
3 delay.” Dkt. 52-1 at 5; Dkt. 52-2 at 4.

4 On December 6, 2012, the Court granted Dahne’s motion to dismiss Richey’s
5 claim for failure to state a claim. Dkt. 21. In reversing this Court’s order granting
6 Dahne’s motion to dismiss, the Ninth Circuit concluded that Richey had stated a plausible
7 claim for violation of his First Amendment right to grieve and retaliation for exercising
8 that right and, regarding the defense of qualified immunity, provided as follows:

9 Dahne seeks qualified immunity because his “actions and decisions were
10 based on his application of Department policy and his attempt to have
11 Richey comply with the grievance program’s requirements so that Richey’s
12 complaint could be addressed.” At the motion to dismiss stage, however, “it
13 is the defendant’s conduct as alleged in the complaint that is scrutinized for
14 ‘objective legal reasonableness,’” *Behrens v. Pelletier*, 516 U.S. 299, 309
(1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (emphasis
in original), and Richey’s complaint says nothing about whether the prison
had any language policy, what that policy was, and how consistently that
policy was enforced. Dahne is therefore not entitled to qualified immunity
at this time.

15 *Richey v. Dahne*, 624 F. App’x 525, 526 (9th Cir. 2015).

16 On June 27, 2016, Judge Strombom issued the R&R recommending that the Court
17 deny Richey’s motion for summary judgment and grant Dahne’s motion for summary
18 judgment because Dahne is entitled to qualified immunity. Dkt. 59. Judge Strombom
19 concluded (1) that material questions of fact exist on Richey’s First Amendment claim,
20 Dkt. 59 at 14, (2) that material questions of fact exist on Richey’s retaliation claim, *Id.* at
21 16, and (3) Dahne is entitled to qualified immunity because Richey’s constitutional rights
22 were not clearly established, *Id.* at 19.

1 On July 7, 2016, Richey filed objections arguing that his rights were clearly
2 established at the time of the alleged violation. Dkt. 62. On July 18, 2016, Dahne
3 responded. Dkt. 64. On July 22, 2016, Richey replied. Dkt. 66.

4 On July 11, 2016, Dahne filed objections arguing that there are no disputed issues
5 of material fact and that Dahne is entitled to summary judgment that he did not violate
6 any of Richey's constitutional rights. Dkt. 63. On July 18, 2016, Richey responded.
7 Dkt. 65.

8 On September 14, 2016, the Court issued an order adopting in part and modifying
9 in part the R&R, granting Dahne's motion for summary judgment, and denying Richey's
10 motion for summary judgment. Dkt. 68. In relevant part, the Court found that, out of the
11 three interactions between Richey and corrections officers regarding his grievances,
12 Dahne personally participated in only one of those interactions. Dkt. 68 at 2. The Clerk
13 then entered judgment in favor of Dahne against Richey. Dkt. 69.

14 On September 19, 2016, Richey filed a motion for relief from judgment arguing
15 that Dahne personally participated in two of the three interactions. Dkt. 70. On
16 December 15, 2016, the Court granted Richey's motion and vacated its previous order
17 and the judgment. Dkt. 73.

18 II. DISCUSSION

19 A. Standard of Review

20 The district judge must determine *de novo* any part of the magistrate judge's
21 disposition that has been properly objected to. The district judge may accept, reject, or
22

1 modify the recommended disposition; receive further evidence; or return the matter to the
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 In this case, the parties have properly objected to the three main conclusions set
4 forth in the R&R. Thus, the Court will conduct a *de novo* review of the motions.

5 **B. Summary Judgment Standard**

6 Summary judgment is proper only if the pleadings, the discovery and disclosure
7 materials on file, and any affidavits show that there is no genuine issue as to any material
8 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

9 In this case, the Court agrees with Dahne that the material facts are undisputed
10 and the matter turns on questions of law. Thus, the Court declines to adopt the R&R to
11 the extent that it concludes that material questions of fact exist.

12 **C. 42 U.S.C. § 1983**

13 Section 1983 is a procedural device for enforcing constitutional provisions and
14 federal statutes; the section does not create or afford substantive rights. *Crumpton v.*
15 *Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under section 1983,
16 a plaintiff must demonstrate that (1) the conduct complained of was committed by a
17 person acting under color of state law and that (2) the conduct deprived a person of a
18 right, privilege, or immunity secured by the Constitution or by the laws of the United
19 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by*
20 *Daniels v. Williams*, 474 U.S. 327 (1986).

21 Qualified immunity shields government officials from civil liability unless a
22 plaintiff demonstrates: “(1) that the official violated a statutory or constitutional right,

1 and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”
2 *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). The Court has discretion to decide
3 “which of the two prongs of the qualified immunity analysis should be addressed first in
4 light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S.
5 223, 236 (2009).

6 **1. Constitutional Violations**

7 Richey asserts two constitutional claims. First, Richey asserts that his
8 constitutional right of access to the courts was infringed. The Ninth Circuit has held “that
9 prison officials may not punish an inmate merely for using ‘hostile, sexual, abusive or
10 threatening’ language in a written grievance.” *Bradley v. Hall*, 64 F.3d 1276, 1282 (9th
11 Cir. 1995). It has also “held that disrespectful language in a prisoner’s grievance is itself
12 protected activity under the First Amendment.” *Richey v. Dahne*, 624 Fed. Appx. 525
13 (9th Cir. 2015) (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009)). In other
14 words, “applying the *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64
15 (1987), factors for assessing the constitutionality of a prison regulation, a prison may not
16 take or threaten adverse action against an inmate for using disrespectful language in a
17 grievance.” *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at 1272–73).

18 In this case, Richey has met his burden to show a violation of his constitutional
19 right. Dahne took the adverse action of ordering Richey to rewrite his grievance because
20 of inappropriate language in the grievance. *Richey*, 624 Fed. Appx. at 525 (citing
21 *Brodheim*, 584 F.3d at 1272–73). Despite Dahne’s numerous arguments to the contrary,
22 it does not get much clearer than the Ninth Circuit reiterating the law in an earlier order

1 in the same case. Moreover, the Court adopts the R&R's rejection of each of Dahne's
2 arguments on this issue. Dkt. 72 at 14. The Court, however, rejects the ultimate
3 conclusion that Dahne has failed to establish an absence of material questions of fact.
4 Instead, the issue is one of law, and the Court concludes that Richey has shown a
5 violation of his constitutional right to freedom of speech. *Bradley*, 64 F.3d at 1281.
6 Therefore, the Court grants Richey's motion and denies Dahne's motion on Richey's
7 First Amendment freedom of speech claim.

8 Second, Richey asserts that Dahne retaliated against Richey because Richey
9 exercised his first amendment rights. "Retaliation against prisoners for their exercise of
10 [their First Amendment] right is itself a constitutional violation, and prohibited as a
11 matter of 'clearly established law.'" *Brodheim*, 584 F.3d at 1269. There are five
12 elements to a retaliation claim:

- 13 (1) An assertion that a state actor took some adverse action against an
14 inmate (2) because of (3) that prisoner's protected conduct, and that such
15 action (4) chilled the inmate's exercise of his First Amendment rights, and
16 (5) the action did not reasonably advance a legitimate correctional goal.

17 *Id.* (quoting *Rhodes v. Robinson*, 408 F.3d 559, 566 (9th Cir. 2005)).

18 In this case, Richey has met his burden on each element of his claim. Dahne took
19 the adverse action of administratively withdrawing Richey's grievance. Although Dahne
20 argues that ordering an inmate to rewrite a grievance is not an adverse action, the R&R
21 sufficiently rejects this argument. Dkt. 59 at 15. "Outside the prison context, we have
22 never held that a plaintiff must establish an explicit threat to prevail on a retaliation
claim. . . . We see no reason why a different standard should apply in this setting."

1 *Brodheim*, 584 F.3d at 1270. Richey has submitted sufficient evidence to create
2 questions of fact whether failing to accept a grievance and being precluded from
3 accessing the court would follow his failure to comply with Dahne's orders. Thus, no
4 matter how egregious the underlying conduct alleged in the grievance, an inmate would
5 have no recourse if he allegedly, and in complete discretion of the grievance coordinator,
6 insulted a guard in the written grievance.

7 As for causation, Richey has shown that questions of fact also exist on this issue.
8 In the offender's kite, Dahne wrote that, due to Richey's decision not to rewrite as Dahne
9 had ordered Richey to do, Dahne had administratively withdrawn the grievance. Dkt. 70
10 at 13. While Dahne asserts that he was following the procedural requirement of
11 administrative withdrawal, Richey has submitted sufficient evidence to show that
12 material questions of fact exist for trial. For example, Dahne's request to rewrite is not
13 dated, making it unclear when the five-day response deadline began and ended. Richey
14 also claims that he did submit a "rewrite" wherein he refused to rewrite his grievance. In
15 light of this evidence, the Court concludes that material questions of fact preclude
16 summary judgment.

17 Regarding the chilling of an inmate's free speech, Dahne's arguments are without
18 merit. In the Ninth Circuit, "a prisoner's fundamental right of access to the courts hinges
19 on his ability to access the prison grievance system." *Bradley*, 64 F.3d at 1279. The
20 Ninth Circuit has "held that an objective standard governs the chilling inquiry; a plaintiff
21 does not have to show that 'his speech was actually inhibited or suppressed,' but rather
22 that the adverse action at issue 'would chill or silence a person of ordinary firmness from

1 future First Amendment activities.” *Brodheim*, 584 F.3d at 1271. A reasonable juror
2 could conclude that repeatedly refusing to accept a grievance because it contains
3 inappropriate language would chill a person of ordinary firmness from submitting
4 additional grievances.

5 Regarding the final element, Richey “must show that the challenged action ‘did
6 not reasonably advance a legitimate correctional goal.’” *Brodheim*, 584 F.3d at 1271
7 (quoting *Rhodes*, 408 F.3d at 568). Richey has easily met this burden because Dahne has
8 failed to advance a legitimate goal. Dahne argues as follows:

9 [P]rison officials have a legitimate penological interest in requiring Richey,
10 and all inmates, to comply with the procedural requirements of the
11 grievance program. Prisons have a legitimate penological interest in
12 requiring that inmate grievances contain only a straightforward statement of
13 concern about the one issue the inmate is grieving and comply with
deadlines. If prisoners are able to flout the OGP’s procedural rules and still
demand that the prison process their grievances, then the ability of prisons
to resolve disputes, maintain order and respect, and enforce prison rules is
threatened.

14 Dkt. 52 at 21. Contrary to Dahne’s argument, the Ninth Circuit has held that “a prison
15 may not take or threaten adverse action against an inmate for using disrespectful
16 language in a grievance.” *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at
17 1272–73). Although Dahne also relies on the timing deadlines, questions of fact exist
18 whether Dahne actually enforced the deadlines or withdrew the grievance in retaliation
19 for Richey’s failure to rewrite the grievance as ordered. Therefore, the Court denies both
20 motions for summary judgment on this aspect of Richey’s retaliation claim because
21 material questions of fact exist for trial.
22

2. Clearly Established Law

Government officials may be immune from constitutional violations if the law was not clearly established at the time of the incident. *Ashcroft*, 131 S. Ct. at 2080.

In this case, the R&R concludes that Dahne is entitled to qualified immunity. Specifically, the R&R concludes that

[w]hile at the time of the challenged conduct in this case the Ninth Circuit had established that inclusion of disrespectful language in a grievance ‘is itself protected activity,’ it cannot be said that instructing an inmate to rewrite a grievance because of the inclusion thereof, necessarily amounted to a violation of an inmate’s First Amendment right to redress grievances.

Dkt. 59 at 19. Contrary to this conclusion, the Court has concluded that failure to accept a grievance because of inappropriate or disrespectful language is a question of law and not a question of fact. As such, the law is clearly established on this issue because the Ninth Circuit has held that “a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance.” *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at 1272–73). Dahne took the action of ordering a rewrite and administratively withdrawing the grievance. The question becomes whether Dahne would objectively know that his actions were “adverse” actions. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (liability “turns on the ‘objective legal reasonableness’ of the action.”). The Court concludes that a reasonable officer would know that either rejecting or withdrawing a grievance because it included offensive language was a constitutional violation.

In fact, the language from the Ninth Circuit cases leaves almost no doubt on this issue. For example, “a prisoner’s fundamental right of access to the courts hinges on his

1 ability to access the prison grievance system.” *Bradley*, 64 F.3d at 1279. We hold that
2 “prison officials may not punish an inmate merely for using ‘hostile, sexual, abusive or
3 threatening’ language in a written grievance.” *Id.* at 1282. Similarly, “[i]t is **well-**
4 **established** that, among the rights they retain, prisoners have a First Amendment right to
5 file prison grievances.” *Brodheim*, 584 F.3d at 1269 (emphasis added). Under these
6 principles, the Court concludes that the contours of Richey’s rights to file a grievance
7 were “‘sufficiently clear’ that every ‘reasonable official would [have understood] that
8 what he is doing violates that right.’” *Ashcroft*, 563 U.S. at 741 (citing *Anderson*, 483
9 U.S. at 640). Therefore, the Court rejects Dahne’s request for qualified immunity on the
10 basis that the law was not clearly established.

11 Dahne, however, also argues that his “actions and decisions were based on his
12 application of Department policy and his attempt to have Richey comply with the
13 grievance program’s requirements so that Richey’s complaint could be addressed.” Dkt.
14 52 at 23. “The doctrine of qualified immunity shields public officials performing
15 discretionary functions from personal liability under certain circumstances.” *Grossman*
16 *v. City of Portland*, 33 F.3d 1200, 1208 (9th Cir. 1994). “[W]hether an official protected
17 by qualified immunity may be held personally liable for an allegedly unlawful official
18 action generally turns on the ‘objective legal reasonableness’ of the action, assessed in
19 light of the legal rules that were ‘clearly established’ at the time it was taken.” *Anderson*
20 *v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted) (quoting *Harlow v. Fitzgerald*,
21 457 U.S. 800, 818–19 (1982)). “Unlike in many [qualified immunity] cases, here the
22 allegedly unconstitutional action undertaken by the individual defendant consists solely

1 of the enforcement of an ordinance which was duly enacted by the city council.”

2 *Grossman*, 33 F.3d at 1209. “Courts have accordingly held that the existence of a statute
3 or ordinance authorizing particular conduct is a factor which militates in favor of the
4 conclusion that a reasonable official would find that conduct constitutional.” *Id.*

5 As with most legal matters, there are no absolutes here. On the one
6 hand, an officer who acts in reliance on a duly-enacted statute or ordinance
7 is ordinarily entitled to qualified immunity. On the other, as historical
8 events such as the Holocaust and the My Lai massacre demonstrate,
9 individuals cannot always be held immune for the results of their official
10 conduct simply because they were enforcing policies or orders promulgated
11 by those with superior authority. Where a statute authorizes official conduct
12 which is patently violative of fundamental constitutional principles, an
13 officer who enforces that statute is not entitled to qualified immunity.
14 Similarly, an officer who unlawfully enforces an ordinance in a particularly
15 egregious manner, or in a manner which a reasonable officer would
16 recognize exceeds the bounds of the ordinance, will not be entitled to
17 immunity even if there is no clear case law declaring the ordinance or the
18 officer’s particular conduct unconstitutional.

19 *Id.* at 1209–10.

20 In this case, Dahne asserts this doctrine with respect to Richey’s retaliation claim.
21 For example, Dahne argues that “[c]onsistent with Department policy, Dahne
22 administratively closed the grievance because Richey refused to comply with a rewrite
instruction within the required time period.” Dkt. 52 at 23. Richey, however, has
submitted sufficient evidence to create material questions of fact on this action. The lack
of a date on the rewrite order and the December 8, 2011 grievance under the same
identification number undermine Dahne’s assertion that he administratively withdrew
Richey’s grievance because of a lapsed deadline. Accordingly, the Court denies Dahne’s
request for immunity on this issue because material questions of fact exist.

III. ORDER

Therefore, it is hereby **ORDERED** that the Court adopts in part and modifies in part the R&R (Dkt. 59), Richey's motion for partial summary judgment (Dkt. 46) is **GRANTED in part** and **DENIED in part**, and Dahne's cross-motion for summary judgment (Dkt. 52) is **DENIED**. The parties shall meet and confer and submit a joint status report regarding pretrial and trial deadlines.

Dated this 15th day of December, 2016.



BENJAMIN H. SETTLE
United States District Judge